Supreme Court of Indiana.

KREAMER *v.* STATE.

Under a statute imposing a fine for the sale of liquor to a minor, no conviction can be had if the accused made the sale to the minor after the exercise of proper caution, and in the honest belief that the purchaser was of lawful age.

An indictment, charging a single sale to one person only, for one price, of a number of commodities, the unlawful sale of either one of which, would, under the statute constitute a public offence, is not bad for duplicity.

APPEAL from Clark Circuit Court.

E. C. Vance and *John H. Stotsenburg*, for appellant.

The Attorney-General, for the state.

The opinion of the court was delivered by

HOWK, J.—In this case, the indictment charged that, at Clark county, on the first day of June 1885, Christina Kreamer did then and there, for the price of ten cents, unlawfully sell to Calvin Henley, a person then and there under the age of twenty-one years, intoxicating, spirituous, vinous and malt liquors. Under appellant's arraignment and plea of not guilty, the issue joined by consent was tried by the court; and a finding was made that she was guilty as charged in the indictment, and her punishment was assessed at a fine of $20. Over appellant's motion for a new trial, judgment was rendered against her for the fine assessed and costs. Errors are assigned here by appellant, which call in question the overruling (1) of her motion to quash the indictment; and (2) of her motion for a new trial. We will consider these alleged errors, and decide the questions thereby presented, in the order of their statement.

1. Did the trial court err in overruling appellant's motion to quash the indictment? This motion was in writing, and two causes were assigned therein for quashing the indictment, namely: First, the indictment does not state any statutory offence: and, second, for duplicity in such indictment, whereby the same is bad." It is manifest that it was intended to charge appellant, in and by the indictment against her, with the statutory offence which is defined, and its punishment prescribed in sect. 2094, Rev. Stat. 1881. So far as applicable to the case in hand, this section of the statute provides as follows:

"Whoever, directly or indirectly, sells * * * any spirituous, vinous, malt, or other intoxicating liquors, to any person under the

age of twenty-one years, shall be fined in any sum not more than one hundred dollars, nor less than twenty dollars."

Appellant's learned counsel very earnestly insist, in their brief of this cause, that the indictment, the substance of which we have heretofore given, is bad for duplicity in this: that it charges, in a single count, the unlawful sale of spirituous, vinous, malt and intoxicating liquors. The indictment is badly constructed, and on that score is justly subject to criticism, but we do not think it can be correctly charged with duplicity, in the proper sense of that term, as applied to an indictment or other pleading. It charges a single sale to one person only, for one price, of a number of commodities, the unlawful sale of either one of which commodities would, under the statute, constitute a public offence. In other words, the indictment charges appellant with only one public offence punishable with only one punishment. In the recent cases of *Davis* v. *State*, 100 Ind. 154, and *Fahnestock* v. *State*, 102 Id. 156, we have held, and correctly so we think, that such an indictment is not bad for duplicity. See, also, *Stockwell* v. *State*, 85 Ind. 522; *Stout* v. *State*, 93 Id. 150, and *Stout* v. *State*, 96 Id. 407. The motion to quash the indictment in the case under consideration was correctly overruled.

2. Under the alleged error of the court in overruling appellant's motion for a new trial, it is claimed by her counsel that the evidence in the record shows, without conflict, that she made the sale of intoxicating liquor to Calvin Henley, as charged in the indictment, after exercising proper caution in the reasonable and honest belief that he was, at the time of such sale, of full and lawful age. We are of opinion that this claim of appellant's counsel is fully sustained by the record of this cause. Under our decisions, such a sale of intoxicating liquor to a minor, made under such circumstances, is not a criminal violation of our statute, making the sale of such liquor to a minor a public offence: *State* v. *Kalb*, 14 Ind. 403; *Rineman* v. *State*, 24 Id. 80; *Goetz* v. *State*, 41 Id. 162; *Payne* v. *State*, 74 Id. 203; *Hunter* v. *State*, 101 Id. 241. Appellant's motion for a new trial ought to have been sustained.

The judgment is reversed, and the cause remanded for a new trial.

Much of the law applicable to sales of intoxicating liquors to habitual drunkards is doubtless applicable to sales to minors, but this note is confined to the latter class of prohibited sales.

1. The doctrine laid down in the main case, that a sale of liquor to a minor upon the exercise of proper caution and in the belief that the minor is of lawful age, is not a criminal offence under stat-

utes similar to the one cited in the opinion, wherein intent is not mentioned as an element of the offence, is sustained by a line of decisions in Indiana, and by the authority of other states: *Moore* v. *State*, 65 Ind. 382; *Ward* v. *State*, 48 Id. 289; *Farbach* v. *State*, 24 Id. 77; *Brown* v. *State*, Id. 113; *Adler* v. *State*, 55 Ala. 16; *Marshall* v. *State*, 49 Id. 21; *Reich* v. *State*, 63 Ga. 616; *Faulks* v. *People*, 39 Mich. 200, and cases cited in opinion.

In *Goetz* v. *State*, 41 Ind. 162, the court said: "The most important question in the case is, whether the defendant was acting in good faith, supposing the witness to have been an adult at the time he sold the whiskey." But in the foregoing class of cases, proof of the sale and of the buyer's minority makes a *prima facie* case, to meet which the seller must show both that he believed, and had reason to believe the minor to be of lawful age: *Payne* v. *State*, 74 Ind. 203; *Goetz* v. *State*, 41 Id. 162; *State* v. *Kalb*, 14 Id. 403; *Reich* v. *State*, 63 Ga. 616. And in *Marshall* v. *State*, 49 Ala. 21, it was said, "the burden of proof is on the defendant and he must prove his good intention beyond a reasonable doubt." Inquiring his age of the minor is not sufficient: *Reich* v. *State*, *supra*.

"It is more important that the young should be protected from temptation, than that those who have not reached their majority should be able to purchase with facility; and therefore, the vendor should be held to the exercise of great care and caution:" *Rineman* v. *State*, 24 Ind. 80.

In determining the question of the vendor's *bona fides*, the appearance of the minor at the time of *trial* is not an element for the jury's consideration: *Robinius* v. *State*, 63 Ind. 235; *Ihlinger* v. *State*, 53 Id. 251.

2. In opposition to the doctrine of the main case, the weight of authority favors the doctrine that where the statute does not mention intent as an element of the offence, the seller is conclusively liable, however honest and well founded his belief in the lawful age of the minor: *Redmond* v. *State*, 36 Ark. 58; *Crampton* v. *State*, 37 Id. 108; *Edgar* v. *State*, Ibid.; *Pounders* v. *State*, Id. 399; *Flynn* v. *Galesburg*, 12 Ill. App. (Brad.) 200; *Dudley* v. *Sautbine*, 49 Ia. 650; *Roberge* v. *Burnham*, 124 Mass. 277; *State* v. Cain, 9 W. Va. 559; *State* v. *Gilmore*, Id. 641.

In *State* v. *Hartfiel*, 24 Wis. 60, the court said: "The words 'knowingly' and 'wilfully,' or other words of equivalent import, are omitted from the statute, and the offence is made to consist solely in the fact of a sale of intoxicating liquors or drinks to a minor. Of this nature are many fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in those cases, seems to bind the party to know the facts, and to obey the law at his peril. The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. Indeed if this were not so, it is plain that this statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched."

"The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge, he does it at his peril. This is the clear meaning of the law, and any other construction would render it exceedingly difficult, if at all possible, ever to procure a conviction for a violation of this clause of the statute. This construction imposes no hardship upon the licensed

seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale:" *McCutcheon* v. *People*, 69 Ill. 601.

It is incumbent on the vendor of liquors to know that his customer labors under no disability, as it is for him to know the law, and his ignorance of neither will excuse him:" *Ulrich* v. *Commonwealth*, 6 Bush (Ky.) 400.

"It is not as though it was lawful to sell generally. Being unlawful to sell to any and all classes, he applied for and obtained a license to sell only to a portion of the community, and he must see that he sells to only such as is permitted by his license:" *Farmer* v. *People*, 77 Ill. 322.

"The business in which the liquor vendor engages is an unlawful business except under circumstances, and when he sells he assumes the burden of knowing that these circumstances exist. * * * When one sells intoxicating liquors, he must know at his peril whether or not a lawful sale can be made to the purchaser:" *Jamison* v. *Burton*, 43 Ia. 282.

"It has been held, that while an honest and reasonable belief in the lawful age of the minor is no defence to a criminal action, it may be shown in mitigation of the offence:" *Crampton* v. *State*, 37 Ark. 108.

3. Where the words "wilfully" "knowingly," or words of like import are used, the prosecution must show that the seller "knew or had reason to know" that the buyer was a minor: *Perry* v. *Edwards*, 44 N. Y. 223; *Hunter* v. *State*, 18 Tex. App. 444.

4. Where the statute provides for the sale of liquor to minors upon the consent of parents, guardians, physicians, &c., the seller must be careful to come within a strict constructiou of the statute: *Jamison* v. *Burton*, 43 Ia. 282; *State* v. *Fairfield*, 37 Me. 517.

The seller must show such consent: *Farrell* v. *State*, 32 Ala. 557; *Edgar* v. *State*, 37 Ark. 219; *Pounders* v. *State*, Id. 399. And if no person be living capable of giving the required consent there can be no legal sale: *Waller* v. *State*, 38 Ark. 657.

Where the statute makes no provision for sales upon the consent of parents, &c., such consent when given will constitute no defence to an action: *Bain* v. *State*, 61 Ala. 75; *Adler* v. *State*, 55 Id. 16; *State* v. *Clottu*, 33 Ind. 409; *Grepel* v. *State*, 32 Ohio St. 167.

5. Where the statute is to the effect that "whoever by himself or his agent or servant shall sell," &c. (Ill. Stat.), the authorities are not agreed upon the question of the principal's liability for unauthorized sales by his agent. Some states maintain that in such a sale there can be no criminal intent on the part of the principal and therefore no offence: *Zeller* v. *State*, 46 Ind. 304; *Thompson* v. *State*, 45 Id. 495; *Lauer* v. *State*, 24 Id. 131; *Anderson* v. *State*, 22 Ohio St. 305.

In *Hanson* v. *State*, 43 Ind. 550, the court, holding such a sale no offence, said: "But can we presume that the defendant when he left the bartender in charge of the bar, made him his agent to sell to a minor, an act which would be in violation of law?"

On the other hand, the liability of the principal for his agent's sales, unauthorized and even contrary to instructions, has been strongly argued: *Dudley* v. *Sautbine*, 49 Ia. 650; *McCutcheon* v. *People*, 69 Ill. 601; *Roberge* v. *Burnham*, 124 Mass. 277.

"The law says to persons wishing to engage in selling spirituous liquors, or to be interested in the sales thereof, you must be careful in the selection of your partners, or servants, and watchful of their conduct in your business; for if they make forbidden sales, you are responsible. * * * If you are not willing to engage or be interested in the busi-

ness on these terms, there is no compulsion upon you to do so:" *Robinson* v. *State*, 38 Ark. 641.

"They forbade him [barkeeper], to sell liquor to minors. So did the law. His duty was no more clearly defined nor made any more imperative by such instructions or commands. * * * Under his employment to sell over their counter in the general course of their trade, he was placed in a position by them where he was necessarily called upon to exercise a discretion in determining the legality of every proposed sale, and it must be held that in passing upon such a question, and in the determination of the fact, according to his best judgment, he was acting within the authority conferred upon him and within the scope of his employment:" *Flynn* v. *Galesburg*, 12 Ill. App. (Bradw.) 200.

6. One present at an illegal sale, aiding in the capacity of change-maker, is liable: *Johnson* v. *People*, 83 Ill. 431. Where the liquor is sold to an adult, by whom it is given to a minor, to be drank at the bar, the seller has been held not liable, unless the buyer was obviously the agent of the minor: *Siegel* v. *People*, 106 Ill. 89. But otherwise if the seller knows that the liquor is purchased for the minor: *State* v. *Munson*, 25 Ohio St. 381. "The fact that it may have been purchased by the defendant, with money furnished in whole or in part by the minor, whereby the liquor became the property of the minor, will not relieve the defendant of guilt" on a charge of illegal giving: *Commonwealth* v. *Davis*, 12 Bush (Ky.) 240.

"Nor will it be a defence, that the liquor was sent for with money, by a third person, to whom it might lawfully have been sold, and that the agent was so informed when he delivered it to the minor: *State* v. *Fairfield*, 37 Me. 517; *Commonwealth* v. *Finnegan*, 124 Mass. 324; *Bain* v. *State*, 61 Ala. 75. But see *Commonwealth* v. *Lattinville*, 120 Mass. 385; *Randall* v. *State*, 14 O. St. 435. See, also, *Ross* v. *People*, 17 Hun 591.

Where the charge is for selling or *giving* liquor to a minor, "the ownership of the liquor is not an ingredient of the offence." CHAS. A. ROBBINS.

Lincoln, Neb.

Supreme Court of Ohio.

JAMES v. BOARD OF COMMISSIONERS OF ALLEN COUNTY.

Where an employee, engaged under a contract for a specified time, the wages being payable in instalments, is wrongfully discharged before the expiration of the period of hire, and all wages actually earned at the time of the discharge have been paid, an action will not lie to recover the future instalments as though actually earned, but the remedy is by action for damages arising from the breach of the contract, and one recovery upon such claim is a bar to a future action.

ERROR to District Court Allen County.

Isaiah Pillars and *Prophet & Eastman*, for plaintiff in error.

Mead & Townsend, for defendant in error.

The opinion of the court was delivered by

SPEAR, J.—This action is brought to recover for wages claimed